

1 COOLEY LLP
2 MATTHEW D. BROWN (Cal. Bar No. 196972)
3 (brownmd@cooley.com) (*pro hac vice*)
4 AMY M. SMITH (Cal. Bar No. 287813)
5 (amsmith@cooley.com) (*pro hac vice*)
6 101 California Street, 5th Floor
7 San Francisco, CA 94111-5800
8 Telephone: (415) 693-2000
9 Facsimile: (415) 693-2222

6 CHRISTOPHER B. DURBIN (WSBA No. 41159)
7 (cdurbin@cooley.com)
8 1700 Seventh Avenue
9 Suite 1900
10 Seattle, WA 98101-1355
11 Telephone: (206) 452-8700
12 Facsimile: (206) 452-8800

10 Attorneys for Defendant
11 KROMTECH ALLIANCE CORPORATION

12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON

13 RIVER CITY MEDIA, LLC, a
14 Wyoming limited liability company,
15 MARK FERRIS, an individual,
16 MATT FERRIS, an individual, and
17 AMBER PAUL, an individual,

18 Plaintiffs,

19 v.

20 KROMTECH ALLIANCE
21 CORPORATION, a German
22 corporation, CHRIS VICKERY, an
23 individual, CXO MEDIA, INC., a
24 Massachusetts corporation,
25 INTERNATIONAL DATA
26 GROUP, a Massachusetts
27 corporation, and STEVE RAGAN,
28 an individual, and DOES 1-50,

Defendants.

Case No. 2:17-cv-00105-SAB

**DEFENDANT KROMTECH ALLIANCE
CORPORATION'S MOTION TO DISMISS
PLAINTIFFS' CLAIMS; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

FED. R. CIV. P. 8(a), 12(b)(2), 12(b)(6)

Date: August 16, 2017

Time: 1:30 p.m.

Courtroom: 203

Judge: The Hon. Stanley A.
Bastian

Trial Date: Not yet set

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND	2
A. Defendants Kromtech and Chris Vickery	2
B. Plaintiffs' Allegations	3
III. LEGAL STANDARDS	4
IV. THE COURT LACKS PERSONAL JURISDICTION OVER KROMTECH.....	5
A. The Court Lacks General Jurisdiction Over Kromtech.	5
B. The Court Lacks Specific Jurisdiction Over Kromtech.....	5
1. Kromtech did not direct any conduct toward Washington.....	6
2. Plaintiffs' claims do not arise out of Kromtech's forum-related activities	9
3. Exercising jurisdiction over Kromtech is unreasonable.....	10
V. PLAINTIFFS FAIL TO STATE ANY CLAIM AGAINST KROMTECH.....	11
A. Plaintiffs' Computer Fraud and Abuse Act ("CFAA") Claim Fails.	11
B. Plaintiffs' Stored Communications Act ("SCA") Claim Fails.	12
C. Plaintiffs' Defend Trade Secrets Act Claim Fails.	14
D. Plaintiffs' Electronic Communications Privacy Act ("Wiretap Act") Claim Fails.	15
E. Plaintiffs' Invasion of Privacy Claim Fails.....	15
F. Plaintiffs' Claims for Intentional Interference with Contractual Relations and Business Expectancy Fail.	16
G. Plaintiffs' Conversion Claim Fails.....	17
H. Plaintiffs' Intentional Infliction of Emotional Distress Claim Fails.	17
I. Plaintiffs' Defamation Claim Fails.	18
VI. CONCLUSION	20

TABLE OF AUTHORITIES

		Page
Cases		
1	<i>Alhadeff v. Meridian on Bainbridge Island, LLC,</i>	
2	167 Wash. 2d 601 (2009)	17
3	<i>Amoco Egypt Oil Co. v. Leonis Navigation Co.,</i>	
4	1 F.3d 848 (9th Cir. 1993)	10
5	<i>Ashcroft v. Iqbal,</i>	
6	556 U.S. 662 (2009)	5
7	<i>Avago Techs. United States Inc. v. NanoPrecision Prods.,</i>	
8	No. 16-cv-03737-JCS, 2017 U.S. Dist. LEXIS 13484 (N.D. Cal.	
9	Jan. 31, 2017).....	14
10	<i>Bell Atl. Corp. v. Twombly,</i>	
11	550 U.S. 544 (2007)	5
12	<i>Birklid v. Boeing Co.,</i>	
13	127 Wash. 2d 853 (1995)	18
14	<i>Butera & Andrews v. IBM Corp.,</i>	
15	456 F. Supp. 2d 104 (D.D.C. 2006)	11
16	<i>Calbom v. Knudtson,</i>	
17	65 Wash. 2d 157 (1964)	16
18	<i>Calder v. Jones,</i>	
19	465 U.S. 783 (1984)	5
20	<i>Calence, LLC v. Dimension Data Holdings,</i>	
21	No. C06-0262RSM, 2007 U.S. Dist. LEXIS 38043 (W.D. Wash.	
22	May 24, 2007).....	11
23	<i>Carafano v. Metrosplash.com, Inc.,</i>	
24	339 F.3d 1119 (9th Cir. 2003).....	18
25	<i>Castaneda v. Saxon Mortg. Servs.,</i>	
26	No. Civ. 2:09-01124 WBS DAD, 2010 U.S. Dist. LEXIS 17235	
27	(E.D. Cal. Feb. 26, 2010).....	8
28		

TABLE OF AUTHORITIES
(continued)

	Page
<i>Cave Consulting Grp. v. Truven Health Analytics, Inc.</i> , No. 15-cv-02177-SI, 2017 U.S. Dist. LEXIS 62109 (N.D. Cal. Apr. 24, 2017)	14
<i>Chan v. Society Expeditions Inc.</i> , 39 F.3d 1398 (9th Cir. 1994)	4
<i>Commodore v. Univ. Mech. Contractors, Inc.</i> , 120 Wash. 2d 120 (1992)	16
<i>In re Consol. Meridian Funds</i> , 485 B.R. 604 (Bankr. W.D. Wash. 2013)	8
<i>Crowley v. CyberSource</i> , 166 F. Supp. 2d 1263 (2001)	15
<i>Daimler AG v. Bauman</i> , 134 S. Ct. 746 (2014)	5
<i>Data Disc, Inc. v. Sys. Tech. Assocs., Inc.</i> , 557 F.2d 1280 (9th Cir. 1996)	5
<i>Davenport v. Wash. Educ. Ass’n</i> , 147 Wash. App. 704 (2008)	17
<i>Dole Food Co. v. Watts</i> , 303 F.3d 1104 (9th Cir. 2002)	6
<i>Emeson v. Dep’t of Corrs.</i> , 194 Wash. App. 617 (2016)	16
<i>Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC</i> , 521 F.3d 1157 (2008)	19
<i>Fed. Deposit Ins. Corp. v. British-American Ins. Co., Ltd.</i> , 828 F.2d 1439 (9th Cir. 1987)	5
<i>Figi Graphics, Inc. v. Dollar Gen. Corp.</i> , 33 F. Supp. 2d 1263 (S.D. Cal. 1998)	7

TABLE OF AUTHORITIES
(continued)

	Page
<i>Fisher v. State ex rel. Dep’t of Health</i> , 125 Wash. App. 869 (2005)	15
<i>Garcia v. City of Lardeo, Tx.</i> , 702 F.3d 788 (2012)	13
<i>Gentry v. eBay, Inc.</i> , 99 Cal. App. 4th 816 (2002)	18
<i>Goodyear v. Dunlop Tires Operations, S.A. v. Brown</i> , 564 U.S. 915 (2011)	4
<i>Int’l Shoe Co. v. Wash.</i> , 326 U.S. 310 (1945)	4
<i>In re iPhone Application Litig.</i> , 844 F. Supp. 2d 1040 (C.D. Cal. 2012)	13
<i>Kloepfel v. Bokor</i> , 149 Wash. 2d 192 (2003)	17, 18
<i>Konop v. Hawaiian Airlines, Inc.</i> , 302 F.3d 868 (9th Cir. 2002)	12, 15
<i>Mohamed v. Uber Techs., Inc.</i> , 836 F.3d 1102 (9th Cir. 2016)	7, 8
<i>In re Nickelodeon Consumer Privacy Litig.</i> , MDL No. 2443 (SRC), 2014 U.S. Dist. LEXIS 91286 (D. N.J. July 2, 2014)	13
<i>Payne v. Office of the Comm’r of Baseball</i> , No. 15-CV-03229-YGR, 2016 WL 1394369 (N.D. Cal. Apr. 8, 2016)	9
<i>Scheier v. City of Snohomish</i> , No. C07-1925-JCC, 2008 WL 4812336 (W.D. Wash. Nov. 4, 2008)	16
<i>Schwarzenegger v. Fred Martin Motor Co.</i> , 374 F.3d 797 (9th Cir. 2004)	4, 6, 10

TABLE OF AUTHORITIES

(continued)

	Page
<i>Shute v. Carnival Cruise Lines</i> , 113 Wash. 2d 763 (1989)	4
<i>Terracom v. Valley Nat'l Bank</i> , 49 F.3d 555 (9th Cir. 1995)	9
<i>Theofel v. Farey-Jones</i> , 359 F.3d 1066, 1075 (2004)	13
<i>Thompson v. Ross</i> , No. 2:10-cv-479, 2010 U.S. Dist. LEXIS 103507 (W.D. Pa. Sept. 30, 2010)	13
<i>United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't</i> , 911 F. Supp. 2d 1118 (E.D. Wash. 2012)	7
<i>Universal Commcn'n Sys., Inc. v. Lycos, Inc.</i> , 478 F.3d 413 (1st Cir. 2007)	19
<i>Walden v. Fiore</i> , 134 S. Ct. 1115 (2014)	6
<i>Williams v. Yamaha Motor Co.</i> , 851 F.3d 1015 (9th Cir. 2017)	7
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980)	4
Statutes	
18 U.S.C.	
§ 1030	11
§ 1836(b)(1)	14
§ 1839	14
§ 2510	13, 14
§ 2701(a)	12, 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

	Page
47 U.S.C. § 230	18, 19
Other Authorities	
Federal Rules of Civil Procedure	
4(k)(1)	4
8(a)	1, 5
12(b)(2)	2
12(b)(6)	2, 5, 11
Restatement (Third) of Agency § 1.01 (2006)	8

1 **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' CLAIMS**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on August 16, 2017, at 1:30 p.m., or as soon
4 thereafter as this motion may be heard in this Court, located at the William O.
5 Douglas United States Courthouse, 25 South 3rd St, Yakima, WA 98907, in
6 Courtroom 203, defendant Kromtech Alliance Corporation ("Kromtech") will move
7 to dismiss the Complaint ("Complaint") filed by plaintiffs River City Media, LLC,
8 Mark Ferris, Matt Ferris and Amber Paul ("Plaintiffs"). This Motion is made
9 pursuant to Federal Rules of Civil Procedure 8(a), 12(b)(2) and 12(b)(6) and is
10 based on this Notice of Motion and Motion, the Memorandum of Points and
11 Authorities, the Declaration of Sergii Sosniak, all papers on file, and upon such
12 other matters that may be presented to the Court.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. INTRODUCTION**

15 Plaintiffs are trying to hale Kromtech into a court without jurisdiction to
16 answer for the alleged wrongful acts of third parties. Plaintiffs allege that
17 Defendant Chris Vickery hacked their computer systems, stole stored data, made
18 unauthorized purchases with Plaintiffs' funds, and subsequently published
19 defamatory statements exposing Plaintiffs' alleged spamming operation. Plaintiffs
20 never allege that Kromtech itself accessed their systems or authored any defamatory
21 statements. Instead, they rely on vague and conclusory allegations that Kromtech
22 and the other Defendants aided and abetted Vickery and acted as each other's
23 agents. But Vickery never was an employee or agent of Kromtech. In fact,
24 Kromtech retained Vickery as an independent contractor for two very narrow
25 purposes: (1) to consult on Kromtech's own network security, and (2) to supply
26 two articles each month to be published on the data security blog hosted on
27 Kromtech's MacKeeper.com website. Plaintiffs never allege that Kromtech
28 directed any defendant to hack Plaintiffs' systems, or that Kromtech exercised any

1 control over the research Vickery and Defendant Steve Ragan conducted, or the
2 content of the articles they published about Plaintiffs’ alleged spamming operation.
3 Vickery had full autonomy over his research and exclusive creative and editorial
4 control over the content of his blog posts.

5 As a result, there is no basis for the Court to exercise personal jurisdiction
6 over Kromtech. Kromtech is a foreign corporation with a foreign principal place of
7 business, it has no offices, employees, assets or agent for service of process in
8 Washington, and it was not involved in the actions that give rise to Plaintiffs’
9 claims. Requiring Kromtech to defend against this action in Washington would be
10 burdensome and unreasonable, and does not comport with due process. Kromtech
11 respectfully requests that this Court enter an order dismissing it from this action
12 pursuant to Rule 12(b)(2). Alternatively, the Court should dismiss this action under
13 Rule 12(b)(6) because the Complaint fails to allege that Kromtech performed,
14 directed or approved the actions that gave rise to Plaintiffs’ claims.

15 **II. FACTUAL BACKGROUND**

16 **A. Defendants Kromtech and Chris Vickery**

17 Kromtech is a British Virgin Islands corporation with its principal place of
18 business in Dubai, United Arab Emirates. (¶ 21; Declaration of Sergii Sosniak ¶
19 2.) Kromtech develops security, maintenance, and optimization software
20 applications for Mac computers, including the MacKeeper product, and sells those
21 applications over the Internet. (¶ 29; Sosniak Decl. ¶ 3.) Kromtech also hosts the
22 “Security Watch with Chris Vickery” blog on its MacKeeper.com website, which
23 reports on data breaches and cybersecurity issues. (¶ 31; Sosniak Decl. ¶ 6.)

24 Kromtech does not have any offices in Washington, does not own or rent any
25 property in Washington, and has no assets in Washington. (Sosniak Decl. ¶ 4.)
26 None of Kromtech’s directors, officers, or employees reside or work in
27

28 1 All “¶ _” citations are to the Complaint, unless otherwise noted.

1 Washington, and Kromtech has no agent for service of process there. (*Id.*)

2 No business or corporate relationship is alleged, and none existed, between
3 Kromtech and Defendants Ragan, CXO Media, Inc. or International Data Group
4 (“IDG”). (*Id.* ¶ 6.) Vickery is not, and has never been, an employee of Kromtech.
5 (*Id.*) In January 2016, Kromtech retained Vickery as an independent contractor to
6 provide two services: (1) to advise Kromtech on network security, and (2) to
7 provide two articles each month; one article on a data breach, the other on a general
8 security topic. (*Id.* Ex. A.) Vickery published his articles on the “Security Watch
9 with Chris Vickery” blog. (*Id.* ¶ 6.) He had full autonomy over how he conducted
10 his research, and exclusive creative control over the content of his blog posts. (*Id.* ¶
11 7.) Kromtech exercised no control over Vickery’s research or the content of his
12 articles, including the article that Plaintiffs allege contains defamatory statements:
13 “Spammergate: The Fall of an Empire” (the “Vickery Article”). (*Id.*; *Id.* Ex. B.)
14 Vickery ended his contract with Kromtech in April 2017. (*Id.* ¶ 7.)

15 **B. Plaintiffs’ Allegations**

16 Plaintiffs allege that Vickery accessed River City Media’s computer network
17 without authorization, collected confidential, proprietary, and sensitive data,
18 intentionally used that data to make unauthorized purchases, and published
19 defamatory statements about Plaintiffs in the Vickery Article, which was posted on
20 the blog on the MacKeeper.com website. (¶¶ 38-76.) The Complaint also alleges
21 that Ragan, a “Senior Staff Writer” of CXO Media (which is owned by IDG),
22 incorporated information Vickery gathered in his article entitled “Spammers expose
23 their entire operation through bad backup” (the “Ragan Article”), which was posted
24 on CXO Media’s website on March 6, 2017. (¶¶ 38, 39, 65-66, 71-74.)

25 However, the Complaint never alleges that *Kromtech* accessed River City
26 Media’s systems, obtained any of its data, made any unauthorized purchases, or
27 authored any defamatory statements. Plaintiffs try to impute the other Defendants’
28 alleged unlawful activities to Kromtech with the catch-all statement that “[e]ach

1 defendant aided and abetted the actions of the other defendants” and “[e]ach
2 defendant was the agent of each of the other defendants, and in doing the things
3 hereinafter alleged, was acting within the course and scope of such agency and with
4 the permission and consent of the other defendants.” (§ 25.) But beyond these
5 allegations, Plaintiffs make no claim that Kromtech had any relationship with CXO
6 Media, Ragan, or IDG. Nor can Plaintiffs establish any agency relationship
7 between Kromtech and Vickery, because Kromtech never exercised any control
8 over Vickery’s actions or the contents of the Vickery Article.

9 **III. LEGAL STANDARDS**

10 A federal court may exercise personal jurisdiction only over a defendant
11 “who is subject to the jurisdiction of a court of general jurisdiction in the state
12 where the district court is located” Fed. R. Civ. P. 4(k)(1)(A). Where, as here,
13 no federal statute governs personal jurisdiction, courts apply the law of the state in
14 which the district court sits. Fed. R. Civ. P. 4(k)(1); *Schwarzenegger v. Fred*
15 *Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Washington’s long-arm
16 statute is coextensive with federal due process requirements. *Shute v. Carnival*
17 *Cruise Lines*, 113 Wash. 2d 763, 771 (1989); *Chan v. Society Expeditions Inc.*, 39
18 F.3d 1398, 1405 (9th Cir. 1994). The exercise of personal jurisdiction over a
19 nonresident defendant comports with due process only when the defendant has
20 “minimum contacts” with the forum state, such that the exercise of jurisdiction does
21 not offend “traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v.*
22 *Wash.*, 326 U.S. 310, 316 (1945). This “minimum contacts” requirement “protects
23 the defendant against the burdens of litigating in a distant or inconvenient forum.”
24 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). A court
25 may assert either general or specific jurisdiction over a foreign corporation
26 defendant, depending on the nature and extent of the defendant’s contacts with the
27 forum State. *Goodyear v. Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915,
28 918-19 (2011). Each defendant’s contacts with the forum state “must be assessed

1 individually.” *Calder v. Jones*, 465 U.S. 783, 790 (1984).

2 Plaintiffs bear the burden of proving that this Court has personal jurisdiction
3 over Kromtech. *Fed. Deposit Ins. Corp. v. British-American Ins. Co., Ltd.*, 828
4 F.2d 1439, 1441 (9th Cir. 1987). Where facts contesting personal jurisdiction are
5 supported by a declaration, a court “may not assume the truth of the allegations in a
6 pleading which are contradicted” by the declaration. *Data Disc, Inc. v. Sys. Tech.*
7 *Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir. 1996).

8 Under Rules 8(a) and 12(b)(6), a complaint that fails to allege facts stating a
9 “plausible” claim must be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
10 The Court should not accept “[t]hreadbare recitals of the elements of a cause of
11 action,” conclusory statements, unwarranted deductions of fact, or unreasonable
12 inferences. *Id.* at 678; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

13 **IV. THE COURT LACKS PERSONAL JURISDICTION OVER KROMTECH.**

14 **A. The Court Lacks General Jurisdiction Over Kromtech.**

15 Plaintiffs have not even attempted to meet, much less satisfied, their burden
16 to establish general jurisdiction over Kromtech. A court may assert general
17 jurisdiction over foreign corporations only “when their affiliations with the State
18 are so continuous and systematic as to render them essentially at home in the forum
19 State.” *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (internal quotations
20 omitted). A foreign corporation is “at home” in its place of incorporation and its
21 principal place of business. *Id.* at 760. Plaintiffs allege that Kromtech is a German
22 corporation, “headquartered in Dubai” and “maintains offices in New Orleans,
23 Louisiana.” (¶ 21.) Plaintiffs do not allege that Kromtech has any business
24 operations, offices, employees or anything else that would make it “at home” in
25 Washington.

26 **B. The Court Lacks Specific Jurisdiction Over Kromtech.**

27 Plaintiffs also fail to establish that the Court may exercise specific
28 jurisdiction over Kromtech in this case. “The inquiry whether a forum State may

1 assert specific jurisdiction over a nonresident defendant ‘focuses on the relationship
2 among the defendant, the forum, and the litigation.’” *Walden v. Fiore*, 134 S. Ct.
3 1115, 1121 (2014) (internal quotation omitted). As a result, the “defendant’s suit-
4 related conduct must create a substantial connection with the forum State,” and the
5 “relationship must arise out of contacts that the ‘defendant *himself*’ creates with the
6 forum State.” *Id.* at 1121-22 (internal quotation omitted) (emphasis in original).
7 The court “looks to the defendant’s contacts with the forum State itself, not the
8 defendant’s contacts with persons who reside there.” *Id.* at 1122.

9 Specific jurisdiction may be exercised only when (1) the nonresident
10 defendant purposefully directed his conduct toward the forum state; (2) the claim
11 “arises out of or relates to the defendant’s forum-related activities”; and (3) the
12 exercise of jurisdiction comports with “fair play and substantial justice, i.e., it must
13 be reasonable.” *Schwarzenegger*, 374 F.3d at 802. None of these requirements is
14 satisfied here.

15 **1. Kromtech did not direct any conduct toward Washington.**

16 Plaintiffs fail to show that Kromtech “purposefully direct[ed]” any of the
17 conduct alleged in the Complaint toward this forum. “Purposeful direction”
18 requires that the nonresident defendant (1) committed an intentional act, (2)
19 expressly aimed at the forum state, (3) that caused harm that the defendant knew
20 was likely to be suffered in the forum state. *Dole Food Co. v. Watts*, 303 F.3d
21 1104, 1111 (9th Cir. 2002). Plaintiffs do not allege that Kromtech itself accessed
22 River City’s systems, obtained any data, or made any unauthorized purchases.
23 Instead, Plaintiffs try to tie Kromtech to Defendants’ alleged actions through the
24 conclusory allegation that the Defendants acted as each other’s agents. (¶ 25.) This
25 falls far short of adequately alleging any agency relationship, and therefore, as
26 explained below, none of the Defendants’ alleged acts can be imputed to Kromtech
27 to show purposeful direction.
28

1 **a. *Defendants’ acts cannot be imputed to Kromtech.***

2 Plaintiffs fail to establish any agency relationship between Kromtech and any
3 other defendant, so the alleged actions of Vickery, Ragan, CXO Media, and IDG
4 cannot be used to exercise jurisdiction over Kromtech. An agent-principal
5 relationship must exist before an agent’s contacts may be attributed to the principal
6 for the purposes of establishing specific jurisdiction. *Williams v. Yamaha Motor*
7 *Co.*, 851 F.3d 1015, 1023 (9th Cir. 2017). To establish an agency relationship,
8 Plaintiffs must allege that “both the principal and the agent have manifested an
9 assent that the principal has a right to control the agent.” *United Bhd. of*
10 *Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep’t*, 911 F. Supp. 2d
11 1118, 1135 (E.D. Wash. 2012). “A critical factor” in determining whether an
12 agency relationship exists is the “degree of control exercised by the principal over
13 the agent.” *Figi Graphics, Inc. v. Dollar Gen. Corp.*, 33 F. Supp. 2d 1263, 1266
14 (S.D. Cal. 1998). If the principal has no control over the day-to-day operations, and
15 only has the right to dictate the end result, then an independent contractor
16 relationship exists. *Id.* For example, in *Figi Graphics*, the court declined to
17 exercise jurisdiction over defendant retail store where the complaint failed to allege
18 specific facts demonstrating that the defendant had the right to control the day-to-
19 day activities of its importer, the purported agent. *Id.* The defendant did not
20 control how or where the importer found its products, and therefore did not have the
21 “requisite degree of control” over the importer to establish an agency relationship.
22 *Id.*; see also *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1115 (9th Cir. 2016)
23 (upholding dismissal where complaint failed to include specific allegations that
24 Uber controlled individual defendant’s activities).

25 Similarly here, Plaintiffs allege no facts establishing an agency relationship
26 between Kromtech and any other defendant. Kromtech has no connection to
27 Ragan, CXO Media, or IDG, and the Complaint fails to plead that Kromtech had
28 any control over Vickery’s day-to-day operations. *Cf. Williams*, 851 F.3d at 1023

1 (rejecting “conclusory” allegations that defendants were agents or employees of
2 each other where plaintiff did not provide any factual assertions regarding degree of
3 control exercised). Plaintiffs’ bare allegation that Vickery “works as a ‘security
4 researcher’ for MacKeeper.com, which is owned and operated by Defendant
5 Kromtech,” does not establish an agency relationship between Kromtech and
6 Vickery. (¶ 20). The mere existence of a relationship in which one person provides
7 services to another does not satisfy the definition of agency. RESTATEMENT
8 (THIRD) OF AGENCY § 1.01 (2006). The Complaint fails to articulate the degree of
9 control Kromtech exercised over Vickery’s day-to-day activities, or whether
10 Vickery’s actions were taken within the scope of his relationship with Kromtech.²
11 In fact, Kromtech had no right to control Vickery’s actions or exercise any editorial
12 control over the content of his blog posts. (Sosniak Decl. ¶ 7; *Id.* Ex. A.)
13 Kromtech’s complete lack of control over Vickery’s actions precludes the existence
14 of an agency relationship.³

15
16
17
18 ² Courts routinely reject boilerplate agency allegations like Plaintiffs’ claim that
19 “[e]ach of the defendants was the agent of each of the other defendants” (¶ 25).
20 *Mohamed*, 836 F.3d at 1115; *Castaneda v. Saxon Mortg. Servs.*, No. Civ. 2:09-
21 01124 WBS DAD, 2010 U.S. Dist. LEXIS 17235, at *19 (E.D. Cal. Feb. 26, 2010).

22 ³ Plaintiffs’ aiding and abetting theory also fails. (*See* ¶ 25.) Aiding and abetting
23 requires (1) the existence of a violation by the primary wrongdoer; (2) knowledge
24 of this violation by the aider and abettor; and (3) that the aider and abettor
25 “substantially assisted” in the primary wrong. *In re Consol. Meridian Funds*, 485
26 B.R. 604, 616 (Bankr. W.D. Wash. 2013). Plaintiffs do not assert that Kromtech
27 knew any defendant violated any laws, or that Kromtech assisted (let alone
28 “substantially assisted”) in the alleged primary violations.

1 **b. *Publication of the Vickery Article does not establish***
2 ***Kromtech’s “purposeful direction.”***

3 Plaintiffs also fail to establish that publication of the Vickery Article on
4 MacKeeper.com—the only act even potentially attributable to Kromtech—was an
5 “intentional act” carried out by Kromtech, rather than Vickery. Plaintiffs concede
6 that Vickery is the author of the Vickery Article, not Kromtech or any of its
7 employees. (See ¶ 65.) Kromtech merely owns MacKeeper.com, which hosts a
8 variety of pages about its products, in addition to the Security Research Center
9 blog. (¶¶ 29, 31.) Vickery’s blog postings were published in a section of the
10 website specifically entitled, “Security Watch with Chris Vickery,” a clear
11 indication of his creative and editorial control over that content. (See Sosniak Decl.
12 Ex. B.) Vickery had full autonomy over how he conducted his research, and
13 exclusive creative and editorial control over the content of his blog posts. (Sosniak
14 Decl. ¶ 7.) Kromtech had no control over his day-to-day activities or how he
15 conducted the research for his articles. (*Id.*) Nor did Kromtech exercise any
16 control over the content of Vickery’s articles, including the Vickery Article at issue
17 here. (*Id.*) Kromtech’s only conceivable intentional act related to Plaintiffs’ claims
18 was its operation of the MacKeeper.com website, but Plaintiffs do not allege that
19 the mere operation of MacKeeper.com was expressly aimed at Washington or
20 caused harm that Kromtech knew was likely to be suffered in Washington.

21 **2. Plaintiffs’ claims do not arise out of Kromtech’s forum-**
22 **related activities.**

23 Plaintiffs also fail to establish that their claims “arise out of” Kromtech’s
24 forum-related activities, such that Plaintiffs would not have suffered any injuries
25 “but for” Kromtech’s forum-related conduct. See *Terracom v. Valley Nat’l Bank*,
26 49 F.3d 555, 561 (9th Cir. 1995). Plaintiffs do not allege that Kromtech accessed
27 River City’s systems, obtained any data, or made any unauthorized purchases. And
28 Kromtech’s ownership of MacKeeper.com does not establish that Kromtech

1 exercised any degree of control over any of the other defendants or the specific
2 defamatory aspects of the articles that purportedly resulted in Plaintiffs' claims.
3 *See Payne v. Office of the Comm'r of Baseball*, No. 15-CV-03229-YGR, 2016 WL
4 1394369, at *6 (N.D. Cal. Apr. 8, 2016) ("arising out of" element not satisfied
5 where plaintiffs did not allege that defendants exerted control over specific acts that
6 gave rise to plaintiffs' claims). Kromtech exercised no control over the other
7 defendants, including Vickery's actions or the content of his blog postings.
8 (Sosniak Decl. ¶¶ 6-7.) As a result, Plaintiffs have not shown that their alleged
9 injuries would not have arisen "but for" Kromtech's forum-related conduct.

10 **3. Exercising jurisdiction over Kromtech is unreasonable.**

11 Even if Plaintiffs established the "purposeful direction" and "arising out of"
12 elements (which they do not), exercising jurisdiction would be unreasonable here.
13 *See Schwarzenegger*, 374 F.3d at 802 (burden shifts to defendant to show
14 unreasonableness only if plaintiff succeeds in satisfying first two prongs).
15 Kromtech is a foreign corporation with no offices, employees, property or other
16 business presence in Washington, and it would be extremely onerous for Kromtech
17 to defend this action here. (Sosniak Decl. ¶ 4.) This alone should have "significant
18 weight" in assessing whether Kromtech should suffer the "unique burden" of being
19 forced to defend this action in a foreign court. *Amoco Egypt Oil Co. v. Leonis*
20 *Navigation Co.*, 1 F.3d 848, 851 (9th Cir. 1993) ("The *unique burdens* placed upon
21 one who must defend oneself in a foreign legal system should have *significant*
22 *weight* in assessing the reasonableness of stretching the long arm of personal
23 jurisdiction over national borders.") (emphasis added).

24 While the burden on Kromtech is great, Washington has little interest in this
25 dispute. *See id.* The individual Plaintiffs are residents of Idaho, (¶¶ 17-19), and
26 River City Media is a Wyoming limited liability company that is not even
27 registered to do business in Washington. (¶ 16; Sosniak Decl. ¶ 5.) Plaintiffs plead
28 no Washington state-law causes of action, and Plaintiffs' federal causes of action do

1 not implicate any Washington state interests. (*See* ¶¶ 20, 22-23.) For these reasons,
2 the exercise of jurisdiction over Kromtech in Washington would not be
3 “reasonable” and the Court should dismiss Kromtech from this action.

4 **V. PLAINTIFFS FAIL TO STATE ANY CLAIM AGAINST KROMTECH.**

5 The Complaint fails to allege that Kromtech itself unlawfully accessed River
6 City’s systems, obtained any data, made any unauthorized purchases, or authored
7 any defamatory statements, and Plaintiffs’ attempt to attribute the other Defendants’
8 actions to Kromtech through an agency or aiding and abetting theory fails as
9 discussed above (*see* Section IV.B.1.a.). For these reasons, even if the Court were
10 to exercise personal jurisdiction over Kromtech, the Court should dismiss
11 Plaintiffs’ claims against Kromtech under Rule 12(b)(6).

12 **A. Plaintiffs’ Computer Fraud and Abuse Act (“CFAA”) Claim Fails.**

13 Plaintiffs fail to identify which CFAA subsection(s) were allegedly violated,
14 leaving Kromtech and the Court to guess whether they have adequately pleaded the
15 elements of their claim. Plaintiffs’ CFAA claim must be dismissed for this reason
16 alone. Among its many provisions, the CFAA imposes civil liability on a
17 defendant who “intentionally accesses” a computer “without authorization” and
18 thereby “obtains . . . information” or “recklessly causes damage” or “causes damage
19 and loss.” 18 U.S.C. §§ 1030(a)(2)(C), (a)(5)(B), (a)(5)(C). Plaintiffs do not allege
20 that Kromtech itself “intentionally accessed” River City’s systems, obtained any
21 information, or caused any damage or loss. All allegations of access, information
22 gathering, and damage are isolated to Vickery’s conduct, and Plaintiffs do not claim
23 that Kromtech directed Vickery to take any of these allegedly unlawful actions.
24 Without such allegations, the Complaint must be dismissed. *See Calence, LLC v.*
25 *Dimension Data Holdings*, No. C06-0262RSM, 2007 U.S. Dist. LEXIS 38043, at
26 *15-16 (W.D. Wash. May 24, 2007) (CFAA claim failed where there were no
27 allegations that corporate defendants improperly accessed computerized
28 information themselves, and plaintiff offered no evidence that corporate defendants

1 directed individual defendants to take any of alleged improper actions); *Butera &*
2 *Andrews v. IBM Corp.*, 456 F. Supp. 2d 104, 110 (D.D.C. 2006) (dismissing CFAA
3 claims against defendant IBM for alleged violations by “IBM employees or agents”
4 because “[i]f the attacks were not authorized by IBM, there are no grounds
5 whatsoever for bringing an action against IBM under [the CFAA, which] requires
6 ‘intentional’ conduct on the part of the defendant”). Plaintiffs’ rote repetition of
7 boilerplate agency and aiding and abetting allegations, invoked for almost every
8 cause of action, do not cure the deficiencies in their claim against Kromtech. (*See*
9 ¶¶ 89, 97, 106, 115, 121, 139, 147.)

10 **B. Plaintiffs’ Stored Communications Act (“SCA”) Claim Fails.**

11 Plaintiffs’ SCA claim against Kromtech must be dismissed because Plaintiffs
12 fail to allege that Kromtech itself intentionally accessed any electronic
13 communications from electronic storage. Even the Complaint’s allegations about
14 Vickery’s alleged actions—which cannot be attributed to Kromtech for the reasons
15 identified in Section IV.B.1.a. above—fail to state an SCA claim.

16 The SCA makes it an offense to “intentionally access[] without authorization
17 a facility through which an electronic communication service is provided . . . and
18 thereby obtain[] . . . access to a wire or electronic communication while it is in
19 electronic storage in such system.” 18 U.S.C. § 2701(a)(1); *Konop v. Hawaiian*
20 *Airlines, Inc.*, 302 F.3d 868, 879 (9th Cir. 2002). Plaintiffs allege that Vickery
21 intentionally and without authorization “gained access” to “information stored on
22 River City’s private computer network,” obtained “business records, including
23 account credentials, client records, email lists, and other records containing
24 sensitive business and personal information” and “used confidential account
25 credentials” to make unauthorized payments through Plaintiffs’ payment accounts.
26 (¶¶ 93-95.) These allegations fail to establish the essential elements of an SCA
27 claim, as explained below.

28 First, the SCA protects only *electronic communications*. Plaintiffs’ laundry

1 list of “records” Vickery allegedly accessed (“account credentials, client records,
2 email lists, and other records”) does not include any electronic communications.

3 Second, the Complaint fails to allege that Vickery, let alone Kromtech,
4 accessed “a facility through which an electronic communication service is
5 provided.” 18 U.S.C. § 2701(a)(1). Computers covered by the SCA “are not
6 computers that *enable* the use of an electronic communication service, but instead
7 are facilities that are *operated by* electronic communication service providers.”
8 *Garcia v. City of Lardeo, Tx.*, 702 F.3d 788, 792 (2012); *In re iPhone Application*
9 *Litig.*, 844 F. Supp. 2d 1040, 1063 (C.D. Cal. 2012). The SCA therefore requires
10 that communications were accessed “while those communications [were] stored on
11 someone else’s computer.” *In re Nickelodeon Consumer Privacy Litig.*, MDL No.
12 2443 (SRC), 2014 U.S. Dist. LEXIS 91286, at *59 (D. N.J. July 2, 2014).
13 Plaintiffs’ claim fails because Vickery allegedly accessed information stored on
14 River City Media’s own computer network, not a third-party location.

15 Third, Plaintiffs fail to show that Vickery “obtain[ed], alter[ed], or
16 prevent[ed] authorized access to a wire or electronic communication while it [was]
17 in electronic storage in such system.” 18 U.S.C. § 2701(a). The SCA defines
18 “electronic storage” as “(a) any temporary, intermediate storage of a wire or
19 electronic communication incidental to the electronic transmission thereof; and (b)
20 any storage of such communication by an electronic communication service for
21 purposes of backup protection of such communication.” 18 U.S.C. § 2510(17); *In*
22 *re iPhone Application Litig.*, 844 F. Supp. 2d at 1058-59. Subsection (A) “applies
23 only to messages in ‘temporary, immediate storage,’” not to “messages not yet
24 delivered to the intended recipient.” *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075
25 (2004). The Complaint only alleges that the records were “stored” on River City’s
26 private computer system. (¶ 93.) And Subsection (B) applies only to “electronic
27 communication services,” which Plaintiffs are not. *See Thompson v. Ross*, No.
28 2:10-cv-479, 2010 U.S. Dist. LEXIS 103507, at *18-19 (W.D. Pa. Sept. 30, 2010).

1 Plaintiffs fail to allege not only that any *communications* were accessed from
2 storage, but also that their network is the type of “temporary, immediate storage”
3 for communications “not yet delivered to the intended recipient” covered by §
4 2510(17)(A).

5 **C. Plaintiffs’ Defend Trade Secrets Act Claim Fails.**

6 Plaintiffs also fail to allege even the most basic elements necessary for their
7 trade-secrets claim against Kromtech. To do so, Plaintiffs must allege that (1) they
8 are the “person[s] or entit[ies] in whom or in which rightful legal or equitable title
9 to . . . the trade secret is reposed,” (2) they took reasonable measures to keep such
10 information secret, (3) the information derives independent economic value from
11 not being generally known, (4) the trade secret is “related to a product or service
12 used in, or intended for use in, interstate commerce,” and (5) the trade secret was
13 misappropriated. 18 U.S.C. §§ 1836(b)(1), 1839(3), 1839(5); *Cave Consulting*
14 *Grp., Inc. v. Truven Health Analytics Inc.*, No. 15-cv-02177-SI, 2017 U.S. Dist.
15 LEXIS 62109, at *8-9 (N.D. Cal. Apr. 24, 2017).

16 Plaintiffs allege that “[w]ithout authorization or permission, Vickery
17 obtained tens of thousands of confidential, proprietary, and sensitive business
18 records, including account credentials, client records, email lists, and other records
19 containing sensitive business and personal information, all of which constitute trade
20 secrets used in interstate or foreign commerce[.]” (¶ 104.) But Plaintiffs do not
21 assert that they took any reasonable measures to keep this information secret, that
22 this information derived any economic value from being secret, or that they held
23 “rightful legal or equitable title” to the information—all essential elements of this
24 cause of action. 18 U.S.C. § 1836(b)(1). Although they claim that this information
25 was “stored on River City’s private computer network,” Plaintiffs fail to allege that
26 this stored information belonged to them, and not someone else. (¶ 103.) Finally,
27 Plaintiffs do not allege that Kromtech knowingly acquired, disclosed, or used any
28 trade secrets, either directly or through Vickery. 18 U.S.C. § 1839(5); *Avago*

1 *Techs. United States Inc. v. NanoPrecision Prods.*, No. 16-cv-03737-JCS, 2017
2 U.S. Dist. LEXIS 13484, at *26 (N.D. Cal. Jan. 31, 2017).

3 **D. Plaintiffs' Electronic Communications Privacy Act ("Wiretap**
4 **Act") Claim Fails.**

5 Plaintiffs plead no elements for a Wiretap Act claim, repeating instead the
6 stock phrases used for their deficient CFAA claim. Plaintiffs must allege that
7 Kromtech (1) "intentionally intercepted" (2) the "contents" of an "electronic
8 communication" (3) using a "device." *Konop*, 302 F.3d at 876. But Plaintiffs do
9 not show that any defendant, let alone Kromtech, intentionally intercepted any
10 communications. The interception must occur during the "very short" period when
11 an electronic communication "travels across the wires at the speed of light." *Id.* at
12 879 & n.6. Here, however, Vickery allegedly obtained "business records, including
13 account credentials, client records, email lists, and other records" that were "*stored*"
14 on River City's computer network. (¶¶ 112-113 (emphasis added).) Plaintiffs fail
15 to allege these records were communications, or that they were intercepted *while in*
16 *transit*. Nor do Plaintiffs allege that any defendant used a "device" covered by the
17 Act. The "device" used to intercept the communication must be separate from
18 Plaintiffs' own "private computer network" (¶ 112), but that is the only device
19 mentioned in the Complaint. *Crowley v. CyberSource*, 166 F. Supp. 2d 1263, 1269
20 (2001).

21 **E. Plaintiffs' Invasion of Privacy Claim Fails.**

22 There are two variations of the tort of invasion of privacy under Washington
23 law: (1) invasion of privacy by intrusion, and (2) invasion of privacy by
24 publication. Plaintiffs fail to state a claim against Kromtech under either theory.

25 Invasion of privacy by intrusion requires "a *deliberate* intrusion, physical or
26 otherwise, into a person's solitude, seclusion, or *private affairs*," and the intruder
27 "must have acted deliberately to achieve the result, with the certain belief that the
28 result would happen." *Fisher v. State ex rel. Dep't of Health*, 125 Wash. App. 869,

1 879 (2005) (emphasis added). Intent is an “essential element.” *Id.* Similarly,
2 invasion of privacy by publication requires the publication of the *private affairs* of
3 another if the matter publicized would be highly offensive to a reasonable person
4 and not of legitimate concern to the public. *See Emeson v. Dep’t of Corrs.*, 194
5 Wash. App. 617, 638 (2016).

6 Plaintiffs do not claim that Kromtech itself ever accessed River City’s
7 systems, let alone that it did so intentionally, or that it directed Vickery to “intrude”
8 into River City’s computer systems. *See id.* at 640 (employee’s allegedly unlawful
9 internet posting could not be imputed to employer where post was made outside
10 scope of her employment). Once again, the boilerplate allegation that Kromtech
11 “kn[ew], approv[ed], and/or ratifi[ed]” Vickery’s alleged actions is insufficient for
12 the reasons discussed above. (¶ 121.) Further, the Complaint alleges that Vickery
13 obtained “business records, including account credentials, client records, email lists,
14 and other records containing personal information,” but provides no allegations that
15 this information concerned “the private lives of each Plaintiff.” *See Scheier v. City*
16 *of Snohomish*, No. C07-1925-JCC, 2008 WL 4812336, at *17 (W.D. Wash. Nov. 4,
17 2008) (dismissing invasion of privacy claim where intrusion was not into personal
18 or private affairs).

19 **F. Plaintiffs’ Claims for Intentional Interference with Contractual**
20 **Relations and Business Expectancy Fail.**

21 Intentional interference with contractual relations and business expectancy
22 claims require the same elements, and Plaintiffs fail to plead either claim here. *See*
23 *Calbom v. Knudtson*, 65 Wash. 2d 157, 161-63 (1964). Plaintiffs assert that
24 negative publicity from the Vickery and Ragan Articles caused River City “to lose
25 contracts, suffer canceled leases, and lay off employees,” and “River City’s
26 business partnerships have been destroyed.” (¶ 67.) But the Complaint fails to
27 identify what contracts were “lost,” that the “lost” contracts were valid, or that
28 Kromtech had knowledge of these alleged contracts or business relationships. *See*

1 *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wash. 2d 120, 137 (1992),
2 amended (Nov. 18, 1992). The conclusory allegation that all “Defendants knew
3 about these contractual relationships . . . [and] business expectancies” makes no
4 sense when even Plaintiffs cannot articulate which valid contracts and business
5 relationships were damaged. (¶¶ 128, 133.) Plaintiffs do not claim that Kromtech
6 intentionally induced any breach of their contracts or intentionally caused the
7 termination of any business relationship, or that it did so by improper means.
8 Plaintiffs point to Vickery’s “unlawful computer access” as the “improper means”
9 of interference, but again, they fail to allege that *Kromtech* accessed its computer
10 systems or directed Vickery to do so. (¶¶ 129, 134.)

11 **G. Plaintiffs’ Conversion Claim Fails.**

12 Plaintiffs also fail to allege that Kromtech itself was involved, in any way, in
13 the actions leading to their conversion claim. Conversion occurs when “a person
14 intentionally interferes with chattel belonging to another, either by taking or
15 unlawfully retaining it, thereby depriving the rightful owner of *possession*.”
16 *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wash. 2d 601, 619 (2009)
17 (emphasis added). Plaintiffs do not claim that *Kromtech* took these documents and
18 deprived Plaintiffs of possession. Further, Plaintiffs’ PayPal funds that Vickery
19 allegedly used can be considered chattel for a conversion claim only if Kromtech
20 “wrongfully received the money or was under obligation to return the specific
21 money to the party claiming it.” *Davenport v. Wash. Educ. Ass’n*, 147 Wash. App.
22 704, 721-22 (2008) (internal quotations omitted). The Complaint does not allege
23 that Kromtech received money from River City’s PayPal account. Plaintiffs further
24 fail to demonstrate any agency relationship between Kromtech and the other
25 Defendants that could render Kromtech accountable for Defendants’ actions.

26 **H. Plaintiffs’ Intentional Infliction of Emotional Distress Claim Fails.**

27 The Complaint does not establish that Kromtech intentionally inflicted severe
28 emotional distress upon Plaintiffs through extreme and outrageous conduct—the

1 exacting showing required for this tort under Washington law. *Kloepfel v. Bokor*,
2 149 Wash. 2d 192, 193 n.1, 195 (2003). Plaintiffs must allege that Kromtech’s
3 conduct was “so outrageous in character, and so extreme in degree, as to go beyond
4 all possible bounds of decency, and to be regarded as atrocious, and utterly
5 intolerable in a civilized community.” *Birklid v. Boeing Co.*, 127 Wash. 2d 853,
6 868 (1995). Plaintiffs allege that Vickery’s “illegal hacking conduct is extreme and
7 outrageous,” (¶ 148), but they do not claim that *Kromtech* hacked River City’s
8 systems, obtained any documents, or directed Vickery to do so.

9 Further, Plaintiffs fail to state any facts about *Kromtech*’s intent to inflict
10 emotional distress. Plaintiff Amber Paul allegedly resigned as the CEO of a
11 separate, unrelated company at the request of that company’s shareholders due to
12 Vickery and Ragan’s allegedly defamatory statements, and this caused Paul
13 “emotional distress.” (¶ 68.) But Plaintiffs do not allege that Kromtech intended to
14 inflict distress through Vickery or Ragan’s statements. Nor do they claim that Paul
15 was peculiarly susceptible to emotional distress, or that Kromtech knew that she
16 were susceptible, as required for this tort. *Kloepfel*, 149 Wash. 2d at 193 n.1, 195.

17 I. Plaintiffs’ Defamation Claim Fails.

18 Finally, Plaintiffs fail to allege that Kromtech was involved in any way with
19 the Ragan Article, and Kromtech is not liable for any alleged defamatory statements
20 in the Vickery Article because it is entitled to immunity under the federal
21 Communications Decency Act (“CDA”), 47 U.S.C. § 230(c). Section 230(c)
22 provides “broad immunity” to online services that publish content “provided
23 primarily by third parties” and preempts state laws that interfere with this
24 immunity. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir.
25 2003). A defendant is entitled to immunity under CDA § 230(c) if (1) it is a
26 provider or user of an “interactive computer service,” (2) the plaintiff’s claim treats
27 it as a publisher or speaker of information, and (3) that information is provided or
28

1 developed by another “information content provider.” *Gentry v. eBay, Inc.*, 99 Cal.
2 App. 4th 816, 830 (2002); 47 U.S.C. § 230(c). All three requirements are met here.

3 The first prong is satisfied because Kromtech owns and operates the website
4 MacKeeper.com (¶ 20), and Vickery “maintained a MacKeeper.com Security
5 Research Center and blog” on that website (¶ 31). As the operator of a website,
6 Kromtech is a provider of an “interactive computer service,” which is defined as
7 “any information service, system, or access software provider that provides or
8 enables computer access by multiple users to a computer server[.]” 47 U.S.C. §
9 230(f)(2); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*,
10 521 F.3d 1157, 1162 n.6 (2008); *Universal Commcn’n Sys., Inc. v. Lycos, Inc.*, 478
11 F.3d 413, 419 (1st Cir. 2007) (“[W]eb site operators . . . are providers of interactive
12 computer services” because “[a] web site . . . enables computer access by multiple
13 users to a computer server, namely, the server that hosts the website.”).

14 The second prong is also met because Plaintiffs allege that Kromtech is one
15 of the publishers of the Vickery Article. (¶¶ 6, 20, 21, 31, 60, 65(a), 153.)

16 Finally, the third prong is satisfied because Vickery, another “information
17 content provider,” wrote the allegedly defamatory statements, not Kromtech. (¶¶ 6,
18 65(a), 71, 72.) An “information content provider” is “responsible, in whole or in
19 part, for the creation or development of information provided through the Internet.”
20 47 U.S.C. § 230(f)(3).) Plaintiffs do not allege that Kromtech was responsible for,
21 or involved in, the creation or development of the Vickery Article. Nor can they,
22 because Kromtech exercised no control over Vickery’s research or the content of
23 the article.

24 ///

25 ///

26 ///

27 ///

28

1 **VI. CONCLUSION**

2 There is no basis for the Court to exercise personal jurisdiction over
3 Kromtech in this case, but even if there were, Plaintiffs fail to state a claim against
4 Kromtech for which relief could be granted. For these independent and alternative
5 reasons, Kromtech respectfully requests that the Court grant its motion and dismiss
6 Plaintiffs' claims against Kromtech.

7
8
9 Dated: June 1, 2017

Respectfully submitted,

10 /s/ Christopher B. Durbin
11 Christopher B. Durbin (WSBA No.
12 41159)
13 Matthew D. Brown (Cal. Bar No.
14 196972) (*pro hac vice*)
15 Amy M. Smith (Cal. Bar No. 287813)
16 (*pro hac vice*)
17 Cooley LLP

18
19
20
21
22
23
24
25
26
27
28
Attorneys for Defendant KROMTECH
ALLIANCE CORPORATION

1 **DECLARATION OF SERVICE**

2

3 I hereby certify that on June 1, 2017, I electronically filed the foregoing with

4 the Clerk of the Court using the CM/ECF System which will send notification of

5 such filing to the following:

6 Leeor Neta
leeor@newmanlaw.com

Attorneys for Plaintiffs

7 Keith P. Scully
keith@newmanlaw.com

Attorney for Plaintiffs

8 Jason E. Bernstein
jake@newmanlaw.com

Attorney for Plaintiffs

9 Charles L. Babcock
cbabcock@jw.com

Attorneys for Defendants
International Data Group, Inc.,
CXO Media, Inc. and Steve Ragan

10 William J. Stowe
wstowe@jw.com

Attorneys for Defendants
International Data Group, Inc.,
CXO Media, Inc. and Steve Ragan

11 Kevin J. Curtis
kjc@winstoncashatt.com

Attorneys for Defendants
International Data Group, Inc.,
CXO Media, Inc. and Steve Ragan

12 Aaron V. Rocke
aaron@rocklaw.com

Attorneys for Defendant
Chris Vickery

13 I declare under penalty of perjury under the laws of the State of Washington

14 that the foregoing is true and correct to the best of my belief.

15 Signed and dated this 1st day of June, 2017, in Seattle, Washington.

16 /s/ Christopher B. Durbin

17 Christopher B. Durbin (WSBA No. 41159)

18 144273636